SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1958

No. 43

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

against

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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Questions Presented

In their Petition for a Writ of Certiorari and in their Brief on the Merits the petitioners set forth questions which they contended were applicable to the instant case.. In

her brief on the merits the libelant-respondent has submitted a Counter Statement of Questions Presented which contains three different questions.

We submit that the third question of libelant-respondent has no place before this Court. In that third question libelant-respondent seeks to have this Court determine whether the contributory negligence of the deceased, if any, is to be determined under the comparative negligence rule of the general maritime law or under the rules of the State of New Jersey. Reference to the majority opinion below (R. 588) indicates that the United States Court of Appeals for the Third Circuit did not determine what defenses were available to the petitioners, feeling that it was not for them in the first instance to do so, since the question had been moot in the District Court. We respectfully suggest, therefore, that it would not be in order for this Court in the first instance to decide the factual and legal questions involved in determining whether the decedent was contributorily negligent or not and the effect of such contributory negligence, if any.

Statement of Facts

The lengthy counter-statement of fact supplied by counsel for libelant-respondent presents a one-sided version of the events occurring aboard m/v Tungus on December 5 and December 6, 1952. This counter-statement of facts also chooses to ignore the findings of fact contained in the opinion of the Trial Judge (R. 570), which is all the more surprising because the majority opinion of the Court of Appeals (R. 581) did not set aside those findings of fact. We particularly have in mind the Trial Judge's finding as to the repair operation and the discharge of the oil having been outside the supervision or control of the officers of the vessel (R. 576). As pointed out on pages 43 and 44 of petitioners' brief on the merits, the foregoing findings of

fact were not set aside by the United States Court of Appeals. Whereas the majority of the Court of Appeals disagreed with the legal conclusions resulting from those findings, the findings themselves were left untouched.

Perhaps some indication of the lack of candor contained in libelant-respondent's counter-statement of facts is the amazing discovery that although the counter-statement of facts covers ten pages, nowhere is it stated that the discharging pump in question together with all its accessory equipment, including suction and discharge lines, was owned by El Dorado. Nowhere is it stated that the pump was being operated by the fellow employees of the deceased. It is obvious that counsel for libelant-respondent, disliking the findings of fact made by the Trial Judge, chooses to ignore them, hoping that this Court would believe that petitioners' employees were in supervision and control of the discharge of the oil and were conducting the repairs to the pump as well. The fact is that both of the lower courts held that this was not so.

Summary of Argument

It seems obvious from his brief that counsel for libelant-respondent has forgotten the nature of the opinion written by Judge Staley on behalf of the majority bench of the United States Court of Appeals for the Third Circuit. That opinion very definitely left many questions unanswered on the grounds that they were to be determined in the first instance by the United States District Court upon a remand of the action, which remand was called for both in the opinion and in the judgment (R. 596). As we read it, Judge Staley's opinion held that the petitioners could be liable *if* the vessel were unseaworthy, and that they could be liable *if* it were found that they were negligent in failing to provide the deceased with a reasonably safe place to

work. The majority, however, specifically refrained from deciding whether m/v Tungus was unseaworthy, whether petitioners breached their duty to the deceased in terms of negligence, and also refrained from determining whether the deceased was contributorily negligent and if so what the effect of that contributory negligence would be. In other words, all the United States Court of Appeals for the Third Circuit did was to set forth a framework upon which and within which the issues of liability were to be determined by the District Court after remand. The reason the petitioners filed a petition to this Court was because they felt that the framework was erroneous, not because petitioners had been held liable either in terms of unseaworthiness or negligence.

The fact is that to date there has been no finding, either by the District Court or by the Court of Appeals, holding that m/v Tungus was unseaworthy. Nor has there been any finding that the petitioners breached any duty to the deceased in terms of negligence. The United States Court of Appeals for the Third Circuit held, and rightly so, that such matters were not for them to decide in the first instance (R. 588).

As we understand libelant-respondent's brief on the merits, her counsel would have this Court operate as a Court of initial jurisdiction and would have this Court make an initial finding as to unseaworthiness and negligence and as to the contributory negligence of the deceased.

We respectfully submit that counsel for libelant-respondent has mistaken the function of this Court. He has also misunderstood the majority opinion of the Court below. The only issue before this Court is whether the framework of law, as set forth in the majority opinion of Judge Staley, is correct or not. If it is correct, then the entire matter must be remanded to the District Court not only for a determination of the issues of unseaworthiness, negligence, and contributory negligence, but also for a

determination of the rights of the petitioners as against the respondent-impleaded under the impleading petition. If the majority opinion below is not correct, then the dismissal of the libel contained in the judgment of the District Court, must be affirmed, and the remaining questions would necessarily become moot.

In other respects libelant-respondent's brief is noteworthy for its avoidance of the principal issues raised in petitioners' brief on the merits. Counsel for libelant-respondent would have this Court believe that the Wrongful Death Act of New Jersey (Revised Statutes of New Jersey 2A:31-1 *et seq.*; N. J. S. A. 2A:31-1 *et seq.*), is a survival statute, which preserved to the libelant-respondent all the rights which the deceased would have had had he been injured only. And yet, counsel for libelant-respondent avoids any reference to the New Jersey Survival Statute (Revised Statutes of New Jersey 2A:15-2; N. J. S. A. 2A:15-2), and makes no reference to the argument contained on pages 33-37 of petitioners' brief on the merits where it was pointed out that the Wrongful Death Act and the Survival Statute are entirely different both as to the basis for liability and as to the resulting damages.

By these evasive tactics counsel for libelant-respondent attempts to circumvent the accepted principle that neither the general maritime law nor the common law have ever provided recoveries for wrongful death.

The majority opinion of the United States Court of Appeals for the Third Circuit states that the libelant-respondent can assert a right to recovery based upon the possible unseaworthiness of the vessel under the Wrongful Death Act of New Jersey.

Such a right to recover for unseaworthiness would have to arise from one or all of three possible sources. It might arise directly from the federal maritime law, or directly from the New Jersey Wrongful Death Act or by survival

of the rights which the deceased himself would have had if he had been injured only rather than killed.

As to the first, even counsel for libelant-respondent concedes that the federal maritime law provides no right to recover in cases of death occurring on waters of a state. There is no question but that the federal maritime law, like the common law, makes no provision for death. That point was conceded by the Court of Appeals majority.

As to the second possible source (that the right to recover for unseaworthiness stems from the New Jersey Wrongful Death Act), we pointed out in the Petition and petitioners' brief on the merits that such an interpretation of the Act is wholly unsupported by the language of the statute, its legislative history or its interpretation by the Courts of the State of New Jersey.

Finally, since it is now urged that the libelant-respondent's right to recover for unseaworthiness stems from a survival of the rights her deceased husband would have had against the vessel if he had been injured only, we refer to the decisions of the Courts of the State of New Jersey which hold that the New Jersey Wrongful Death Act is *not* a survival statute, but creates an entirely new cause of action. New Jersey has a separate survival statute, in which, however, damages are limited to conscious pain and suffering of the deceased, medical expenses in connection with his illness, if any, and similar matters, as to all of which there was no proof of damages in the instant suit. These cases were referred to in our Brief on the Merits at pages 33-37.

The decision of the United States Court of Appeals for the Third Circuit cannot be justified under any of the foregoing theories.

ARGUMENT

Libelant-Respondent Is Not Entitled to a Trial *De Novo* In This Court On Factual Issues.

Under Point IV running from page 46 to page 60 of libelant-respondent's brief counsel seeks to have this Court make initial findings as to the seaworthiness of the vessel and as to a breach of duty by the petitioners to the deceased. In so doing he pleads at page 46 that an admiralty appeal is a trial *de novo* and that this case is fully reviewable in this Court both as to facts and the law to be applied to those facts.

We submit that counsel for libelant-respondent has misconceived the scope of review in an admiralty case.

The proper scope of review in a case such as this has been defined by this Court in *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), as follows:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure."

The pertinent portion of Rule 52(a) of the Federal Rules of Civil Procedure reads as follows:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * * "

The Rule does not state that *only* findings of fact based upon the credibility of witnesses will not be set aside unless clearly erroneous, but says that *no* findings of fact will be set aside unless clearly erroneous.

The Court below has recognized the demise of the concept of a trial *de novo*. In *Taylor* v. *Crain*, 224 F. 2d 237, 238 (3 C. A., 1955), Judge Goodrich wrote as follows:

> "Although briefs and arguments still repeat the phrase about an appeal in admiralty being a trial de novo, the Supreme Court has now stated categorically that we are to treat a finding in an admiralty case the same as one in a civil action governed by rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. *McAllister* v. *United States*, 1954, 348 U. S. 19, 75 S. Ct. 6."

Since counsel for libelant-respondent exhibits reliance in his brief upon the opinions of Dean Roscoe Pound, Editor in Chief of the NACCA Law Journal, we feel that perhaps the comment of Dean Pound on the case of *McAllister* v. *United States, supra,* as found at 15 NACCA Law Journal 277, would be of interest. Dean Pound wrote as follows:

> "It is gratifying to have our highest tribunal give up the hearing de novo by a court that has not seen or heard the witnesses and put all appeals on the same plane."

Other Circuits have agreed that the case of *McAllister* v. *United States, supra,* was the obituary to the old concept of a trial *de novo* in admiralty. In *Peterson* v. *United States*, 224 F. 2d 748 (9 C. A. 1955), Judge Orr wrote at page 749:

> "It is urged that we should determine the facts for ourselves under a theory of trial de novo. That theory has recently been laid to rest by the Supreme Court of the United States in the case of McAllister v. United States, 1954, 348 U. S. 19, 20, 75 S. Ct. 6, 8."

We submit, therefore, that since an appeal to a United States Court of Appeals in an admiralty suit is not a trial *de novo*, then most certainly the instant action cannot be deemed to be before this Court under any such theory.

The findings of fact of the Trial Judge, therefore, not having been set aside by the Court of Appeals as "clearly erroneous", are still valid and applicable, and the questions of law now before this Court are to be determined within the framework of those findings of fact, whether counsel for libelant-respondent likes them or not.

The Issue of the Contributory Negligence of the Deceased Is Not Presently Before This Court.

Point V of libelant-respondent's brief running from pages 61 through 68 is devoted to a discussion of the defense of contributory negligence both in terms of whether there was any and in terms of its effect. We submit that the issue of contributory negligence has never been passed on by either of the lower Courts.

In their answer to the libel petitioners urged as an affirmative defense the contributory negligence of the deceased (R. 26). That defense was never passed upon by the Trial Court, since its judgment dismissing the libel on the merits made a determination of the defense of contributory negligence unnecessary. Nor did the Court of Appeals pass on the issue. Judge Staley, writing for the majority, wrote as follows (R. 588):

> "While the New Jersey wrongful death statute adopts the maritime standard of care, it is silent as to available defenses. It is not for us in the first instance, however, but rather for the trier of fact, to determine whether the vessel's duty was breached and to decide factually what defenses, if any, might be available to the respondent. The question of the unseaworthiness of the vessel is likewise one which should be determined initially by the district court".

It will be noted that petitioners have not urged in their brief on the merits (as it is their intention to urge if the suit is remanded to the District Court) that the deceased

was contributorily negligent in causing his own death, and have not urged in their brief on the merits that any contributory negligence on the part of the deceased would serve as a bar to recovery in accordance with the prevailing rules in the Courts of the State of New Jersey. We can only suspect that proctor for libelant-respondent has included the Point on contributory negligence because the question is present in *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association,* 251 F. 2d 708 (2 C. A. 1958), now No. 56, October 1958 Term in this Court, and both the *Halecki* brief and the *Skovgaard* brief were written by counsel at approximately the same time.

Unseaworthiness Is Not a "Wrongful Act, Neglect or Default".

In their brief on the merits petitioners referred this Court to the authorities which pointed up the existing distinctions between concepts of negligence and warranties of seaworthiness. On pages 26 and 27 of his brief counsel for libelant-respondent attempts to convince this Court that unseaworthiness and negligence are one and the same thing in a seaman's action under the Jones Act (46 U. S. Code Sec. 688). The cases cited by him, however, are injury cases in which the injured seaman had a cause of action for negligence under the Jones Act and a second cause of action for unseaworthiness under the general maritime law. The same double remedy does not exist, however, when a seaman is killed rather than injured only. Our Courts have held that in a death case the representative of the deceased seaman is limited to a cause of action for negligence and is barred from proceeding for unseaworthiness under the general maritime law. In *Lindgren* v. *United States,* 281 U. S. 38, 47 (1930) this Court held that the Jones Act afforded the exclusive remedy for the death of a seaman and ruled out any recovery for unseaworthiness in the following terms:

> "Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this suggestion is that the prior maritime law, as hereinabove stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel."

It is quite apparent that this Court did not consider claims for negligence under the Jones Act and claims for unseaworthiness under the general maritime law to be one and the same thing.

To the same effect is the decision of the Court below in *Landy* v. *United States*, 101 F. Supp. 486 (E. D. Pa. 1951), affirmed 197 F. 2d 524 (3 C. A. 1952). This was a libel brought against the United States under the Suits in Admiralty Act (46 U. S. Code § 742) by the administrator of the estate of a deceased seaman to recover under the Jones Act. In discussing the claim on page 488 of 101 F. Supp., Circuit Judge Klodner stated in a footnote:

> "In addition to asserting that respondent was negligent in allowing this condition to exist, libellant also claims that this defect in the ladder rendered the vessel unseaworthy. The latter claim must be rejected without further consideration, since a cause of action for unseaworthiness, being an admiralty cause of action, does not survive the death of a deceased seaman. Robinson, Admiralty, p. 340. See also O'Neill v. Cunard White Star Ltd., D. C. 1946, 69 F. Supp. 943."

The United States Court of Appeals for the Third Circuit affirmed in a *per curiam* opinion reported at 197 F. 2d 524 (3 C. A. 1952), stating that they were in full accord with the conclusion of the District Court.

In other words, unseaworthiness and negligence are *not* the same thing.

In recognition of the weakness of his argument that unseaworthiness is a "wrongful act, neglect or default" counsel for libelant-respondent pleads for a broad liberal view of the problem and for a liberal construction of the statute. We submit that if ever a statute has been given broad liberal construction it is the Jones Act giving seamen causes of action against their employers. And yet, it will be noted, that despite all the liberality which has been exercised in favor of seamen, the basic distinction between negligence and unseaworthiness has never been breached. It is apparent from the authorities that if a seaman were injured only as a result of non-negligent unseaworthy condition he could recover, whereas if he were killed under the same circumstances recovery would be impossible. Perhaps this may be termed a harsh or unjust result, but it is a fact and a legal fact stemming directly from the rule that federal maritime law makes no provision for death. It is no more harsh or unjust to say that this deceased shore-worker might have sued for unseaworthiness had he survived, but since he died his representative has no such remedy available to her.

The Libelant-Respondent Is Not Entitled to Recover Under the Federal Maritime Law.

In his brief counsel for libelant-respondent skips blithely from the law of the State of New Jersey to the federal maritime law and back again as suits his purpose. After citing numerous authorities on pages 15, 16, 17 and 18 of his brief, counsel for libelant-respondent concedes that the general rule that the general maritime law does not provide for recovery for wrongful death is not overthrown and yet in the body of his brief one would never suspect that this was a wrongful death case, since nearly all the citations, authorities and references are to injury

cases, which were adjudicated under the general maritime law rather than under state law. It is obvious that counsel for libelant-respondent is enamoured of the general maritime law until the moment of death, and that from such moment on he will have none of it, since the general maritime law makes no provision for death. It would serve no useful purpose at this time to restate in detail the inapplicability of such cases as *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406 (1953); and other similar cases where the libelant or the plaintiff was suing to recover for injuries only under the general maritime law. The inapplicability of such cases has been commented upon already in petitioners' brief on the merits. Perhaps it is sufficient to refer to Mr. Justice Black's comment in *Pope & Talbot Inc.* v. *Hawn, supra*, when he stated at 346 U. S. 409:

> "His [Hawn's] right of recovery for unseaworthiness and negligence is rooted in federal maritime law".

Since it was so rooted that law took precedence over any state law which might have been urged by him. In the instant matter, however, we would remind this Court that the rights of the libelant-respondent are not "rooted in federal maritime law". If there were, the rights would be non-existent, because the federal maritime law has nothing but a void once death occurs. The authorities on that point are legion and need not be repeated at this stage. All the Judges below, the Trial Judge and the seven Judges of the United States Court of Appeals, agreed that the federal maritime law provided no remedy for wrongful death, and that the libelant-respondent was restricted to asserting a cause of action under New Jersey law. If only this basic principle is kept in mind it becomes apparent that the host of authorities referred to in libelant-respondent's brief must fall by the wayside.

The Petitioners Did Not Warrant the Seaworthiness of Conditions in No. 3 Shelter Deck to the Deceased.

Under Point V of our brief on the merits running from pages 38 through 42 we argued on behalf of the petitioners that it would be ridiculous to state that any warranty was made by the petitioners to the deceased either with respect to the pump itself or with respect to the oil spill created by the pump. In attempting to avoid the impact of the cases cited in that Point, counsel for libelant-respondent argues that the deceased was killed as a result of the oil spill and not as a result of the pump which he was engaged in repairing. We submit that the breakdown of the pump, which the deceased was engaged in repairing, and the spilling of the oil caused by the failure of that pump are inseparable. One followed the other just as naturally as night follows day. The question is not whether the deceased was hired to clean up the oil, but whether the petitioners warranted to the deceased that there was, in effect, no oil spill at all when he came aboard to repair the pump.

In *Broecker* v. *Armstrong Cork Co.*, 128 N. J. L. 3, 24 A. 2d 194 (1942) referred to in petitioners' brief on the merits, the New Jersey Court held that it was difficult to see how one who engaged an independent contractor was under any duty to guard the servants of that contractor against the very dangers that arose from their work. Under that reasoning no duty would be owed by these petitioners to the deceased with respect to the oil spill. The oil spill was a natural and logical consequence of the failure of the pump. The deceased, a maintenance man, came aboard to repair the pump, and there is no question but that the spilled oil was a danger, if danger it was, which he met every day in the course of his work for the oil company.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be reversed and the libel dismissed.

Dated, New York, N. Y., October 20, 1958.

Respectfully submitted,

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